Paradoxes and Dilemmas in Compliance and Enforcement

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Scholars have relentlessly argued for tougher EU action against illiberal governments whose actions erode constitutional checks and balances. The panoply of EU tools is large and it comprises mechanisms for compliance via dialogue and engagement (the Framework for the Rule of Law; the new Commission Rule of Law reporting cycle; the Council Dialogue on the Rule of Law), the several infringement procedures (e.g. here) and other ECJ cases with RoL implications (e.g. here), and procedures seeking enforcement, such as article 7 with its preventive and corrective stages (first stage has been activated against Hungary and Poland).

A paradox

Yet, EU action remains inefficient since, to date, none of these mechanisms, jointly or individually, have been able to extract *substantial* compliance but rather what Agnes Batory called "symbolic and creative compliance" designed to create the appearance of norm#conform behavior without giving up their original objectives. This poor performance reveals a crucial *paradox on rule of law compliance*: the EU is a community of law that lacks the last enforcement mechanism; i.e coercion. It depends on the member states' commitment to rule of law for effective compliance. Hence, why would a rule of law challenger comply with EU requests if this implies adhering to precisely the very same value challenged?

Even though most scholars do not explicitly recognize this paradox, they adhere to the intuitive response to it: the solution requires stronger enforcement. Unsurprisingly, both EU institutions and scholars have turned towards sanctions as a possible efficient mechanism for obtaining compliance. International relations scholars have debated at length whether sanctions work without reaching a conclusive position. And the EU's record of sanctions is short: financial sanctions arrived late to the panoply of enforcement instruments of the EU and have not been applied, for instance, under the Stability and Growth Pact regime. And, of course, the EU has not activated the sanctioning stage of article 7. Conscious of these limitations, some EU governments pressed for EU funds-related sanctions and EU institutions have moved towards introducing rule of law linked conditionality in the use of EU funds via the new Regulation on a general regime of conditionality for the protection of the Union budget. Certainly, this move affects, specifically, funds and, in this way, conditionality can hardly be conceived as a mechanism for safeguarding rule of law at large. However, given that EU funds contribute to the consolidation of an authoritarian equilibrium in illiberal states such as Hungary, the move is welcome (in particular, when seen in relation to the lack of efficacy of previous measures). European funds are essential for Hungary and Poland and also instrumental in lubricating some of their populist and clientelist policies.

A dilemma

The existence of an *enforcement dilemma* explains the move towards the use sanctions via funds but also the changed rules for decision-making. The dilemma is the following: *intergovernmental sanctions mechanisms* such as article 7 rely, in the last instance, on governments' willingness to act. As far as the maintenance of RoL in third EU member states does not affect other members (i.e. does not create negative externalities), the later governments may perceive the costs of defending RoL as higher than the potential benefits. Hence, they may believe they have few incentives to act.

The forthcoming Regulation addresses this dilemma with two different instruments. On the one hand, increases the delegation to the Commission as direct enforcer: the Commission may propose suspending funds transfer and other measures via an implementing act. The hypothetical targets of these sanctions, the governments of Hungary and Poland, have clearly identified the threat of an autonomous Commission seeking enforcement and, consequently, sought to dilute the risk by conditioning the Commission's action. The European Council conclusions recorded the Commission´s "commitment" to adopt guidelines for the application of the Regulation, the "commitment" not to complete them if a ECJ case for annulment is brought against the Regulation and its "intention" to adopt a Declaration committing itself to apply the elements contained in the conclusions.

A less dire reading

Laurent Pech has argued that the conclusions straightjacket the Commission's action and are a gift to autocrats whilst Scheppele, Pech and Platon joint others (see Alemanno and Chamon and Dimitrovs) to claim that the Conclusions violate EU law. Certainly, the literal reading of these conclusions, next to the aesthetics of the process and the prominent role in it of the two governments under article 7 procedures does convey a not very positive picture. However, without denying the appearance of surrender that the European Council declaration creates, a less negative reading is also possible: potential plaintiffs have 2 months to raise the annulment action in front of the ECJ (as per article 263). EU institutions may ask for an accelerated procedure and this means that the Court may resolve by the end of 2021. That the guidelines must be finalized after the judgment does not mean that the Commission cannot advance in its preparation. In parallel, the Commission is not barred to prepare a case under the Regulation (since it enters into force on 1st January) and allegedly, preparing a case will take some time. In summary, a possible interpretation of the European Council conclusions could be that they change little in terms of the period and timing required to enforce the Regulation. What is beyond doubt is that the Commission emerges as the main player in enforcing the rules of the game and the question is whether it will bypass previous cautions in its implementation strategy. Despite criticism, the Commission faces its own compliance dilemma: how to obtain compliance with an enforcement measure if the offender openly challenges rule of law?

On the other hand, a second feature enhances even further the increased enforcer role of the Commission: the sanctioning measures only need approval by qualified majority of 55% of EU countries representing at least 65% of the total EU population within one month (or, exceptionally, two more). Surely, this is not as good as the Commission original proposal to apply reverse qualified majority but it is a much better option than the unanimity in article 7. Certainly, lowering the institutional requirements for decision-making increases the credibility of the threat of sanctions since it implies a reduced capacity for blocking action by specific member states (or groups of members).

In any case, the function of a sanctions regime should not be imposing penalties. Rather, the efficiency of a sanctions regime must depend on its credibility: the preparedness of the enforcer to act and the costs for the offense must be sufficient to convince any offender to desist. In this respect, Barroso misinterpreted the notion of "nuclear" option of article 7. The basic of nuclear doctrine was *deterrence*: a party would avoid any aggression if it thought that the resolve to respond of its opponent was unquestionable. What we have learned so far about compliance and enforcement of rule of law is that, in the absence of voluntary compliance, the credibility of enforcement becomes crucial for extracting such compliance. How can deterrence be inserted in rule of law enforcement so that compliance becomes the less costly option for potentially offending parties? By increasing the credibility of the "threat" (i.e. enforcement of sanctions). Following the model of the Regulation on conditionality of funds, changes in decision-making are essential; i.e. changing the unanimity requirement of article 7. But this leads to another paradox: unanimity can only be changed in treaty revision by a unanimous vote!

Beyond those proposals, there are two different theoretical questions that appeal to the character of the EU. The first is whether rule of law can maintained on the basis of supranational institutions actions and sanctions alone: hypothetically, would the EU be able to obtain compliance just by using assertive Commission action and financial sanctions if a very large member state were to violate rule of law? The second prospective question is what happens if the EU is unable to deter an errant illiberal government in its path towards authoritarianism? Events in the last decade show clearly that even the unthinkable may happen and the comfortable belief that the EU is a cozy club of irreversible democratic and law-abiding states may prove totally wrong if some illiberal states take the last turn towards some nastier model of regime. In this scenario, the EU may need to introduce a proper expulsion clause … even though this leads towards the unanimity limitations mentioned above. Critics may dismiss those two questions as unrealistic but events in the last two decades have shown that the unthinkable may happen. Hence, the EU may well reflect on incredible scenarios.
